Nos. 83-245, 83-291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE* and BRIEF, *AMICUS CURIAE*, OF THE NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION IN SUPPORT OF APPELLEE R. A. GRAY & COMPANY

WILLIAM H. BORGHESANI, JR.*
(*Counsel of Record)
MICHAEL F. MORRONE
PETER A. SUSSER
KELLER & HECKMAN
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-1100

Attorneys for *Amicus Curiae*, National-American Wholesale Grocers' Association

January 10, 1984

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF, *AMICUS CURIAE*

The National-American Wholesale Grocers' Association (hereinafter "NAWGA") respectfully moves, pursuant to Rules 36.3 and 42 of this Court's Rules, for leave to file the attached brief *amicus curiae*.[1] In support of this motion, NAWGA—by its undersigned counsel—states:

1. NAWGA is a national trade association representing nearly 400 independent wholesale grocers and food service distributors. These companies, both large and small, supply grocer products and provide a wide array of services to retail grocery

[1] Pursuant to Rule 36.1, counsel for NAWGA requested the consent of counsel for the parties to the filing of a brief *amicus curiae* in this case. Counsel for appellant, Oregon-Washington Carpenters-Employers Pension Trust Fund, has refused to consent to the filing of the brief, necessitating this motion.

stores, hospitals, schools, restaurants and other food service establishments throughout the United States. Marketing products from over 800 separate distribution centers, NAWGA member companies account for nearly $50 billion of the nation's grocery product volume and one-third of the grocery supply distributed nationally. NAWGA's food service division, the International Food Service Distributors' Association, represents member firms who sell annually over $10 billion in food and related products to the institutional, away-from-home food service market.

2. Many NAWGA members are subject to collective bargaining agreements pursuant to which they contribute to various multiemployer pension funds. Since the enactment of the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), P.L. No. 96-364, 94 Stat. 1208 (September 26, 1980), withdrawal liability has become a very important consideration to NAWGA and its members. NAWGA members have frequently indicated that multiemployer pension plan withdrawal liability is a serious problem which imposes restrictive and unfair burdens on wholesale grocers' attempts to conduct their businesses with optimal efficiency. A number of NAWGA members have been assessed with large amounts of withdrawal penalties; significantly, these have included members withdrawing from multiemployer plans between April 29, 1980 and September 26, 1980. The constitutionality of liability imposed for multiemployer plan withdrawal which occurred during this five-month period is the question presented in this case.

3. The decision below correctly articulated the fundamental due process standards violated by MPPAA's retroactive application to employers who withdrew from multiemployer plans prior to the statute's enactment. However, due to the fact that two appellate courts have now sanctioned the unconstitutional taking and interference with settled contractual expectations effectuated by the MPPAA's retroactive provisions, this Court's resolution of the Appellee's due process claims will have a nation-wide impact upon employers assessed with massive withdrawal liability for acts taken before the statute's enactment. Leave of this Court is sought to offer

NAWGA's unique, "hands on" perspective on the proper resolution of these important issues raised by the parties, so that the decision in this case can most effectively be reconciled with the due process rights of affected employers guaranteed by the Constitution.

For the foregoing reasons, NAWGA should be permitted to file the attached brief, *amicus curiae*.

Respectfully submitted,

/s/_____
William H. Borghesani, Jr.

WILLIAM H. BORGHESANI, JR.*
(*Counsel of Record)
MICHAEL F. MORRONE
PETER A. SUSSER
KELLER & HECKMAN
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-1100

Attorneys for *Amicus Curiae*,
National-American Wholesale
Grocers' Association

January 10, 1984

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases (Continued)

United States Constitution

Nos. 83-245, 83-291

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND,
Appellant,

v.

R. A. GRAY & COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF of *AMICUS CURIAE*, THE NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION IN SUPPORT OF APPELLEE R. A. GRAY & COMPANY

INTRODUCTION

This case is a review of a decision by the United States Court of Appeals for the Ninth Circuit which held unconstitutional the retroactive application of the Multiemployer Pension Plan Amendments Act ("MPPAA" or "the Act"), P.L. No. 96-364, 94 Stat. 1208 (1980). The Act amended the multiemployer pension plan termination provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001a, *et seq.* (1976 and Supp. V 1981). The Court of Appeals held that the withdrawal liability provisions of the Act, as applied to employers who withdrew from multiemployer pension plans before the Act became law, violate guaranteed rights of due process.

The opinion of the Court of Appeals is reported at 705 F.2d 1502.

The question presented in this case is whether the Act's imposition of withdrawal liability is constitutional as applied to employers leaving a multiemployer pension plan prior to the date on which the Act became law.

1.
INTEREST OF *AMICUS CURIAE*, THE NATIONAL-AMERICAN WHOLESALE GROCERS' ASSOCIATION

The National-American Wholesale Grocers' Association ("NAWGA") is a national trade association which represents nearly 400 independent wholesale grocers and food service distributors. NAWGA's membership includes both large and small enterprises, and provides both grocer products as well as a wide array of services to various food service establishments throughout the country. Hospitals, schools, restaurants and retail grocery stores are among the many establishments supplied by NAWGA-member firms, whose $50 billion in sales constitutes one-third of the grocery supply distributed nationally. In addition, the International Food Service Distributors' Association, NAWGA's food service division, is composed of member firms whose sales of food and related products to the institutional food service market exceeds $10 billion annually.

The employees of a large number of NAWGA-member firms are organized by various labor organizations; indeed, many NAWGA members have contractual relationships with several different unions, which represent distinct bargaining units of their workers. Thus, locals of the International Brotherhood of Teamsters may represent the truck drivers employed by the wholesale grocer, while the United Food and Commercial Workers, the Hotel Employees and Restaurant Employees International Union or other labor organizations may represent distribution center employees or workers employed in other company facilities. Pursuant to many of the collective bargaining agreements involving such labor organizations, NAWGA-member firms contribute to various multiemployer pension funds.

Since the enactment of MPPAA, the issue of withdrawal liability assessment has been a major concern to NAWGA members and an important consideration in their business decisions. As a general matter, NAWGA-member firms have indicated that the potential assessment of massive, unbudgeted withdrawal liability–which may bear little, if any, relation to a company's assets or to the employees for whom the Company previously made contributions–has unfairly restricted efforts to operate with optimal efficiency. More directly, certain NAWGA members have been assessed with large amounts of withdrawal liability. Significantly, a number of these assessments have been made against companies withdrawing between April 29, 1980 and September 26, 1980, the "retroactive period" at issue in this case. The considerable impact on NAWGA members of such assessments for pre-enactment actions, together with an overall interest in the withdrawal liability mechanism created by MPPAA, establishes the interest of NAWGA and its members in this proceeding. As is evident in the argument which follows, NAWGA is supportive of the position of Appellee R. A. Gray & Company, that the decision of the Court of Appeals should be affirmed.

2.
SUMMARY OF ARGUMENT

The application of the withdrawal liability provisions of the MPPAA to employers leaving multiemployer pension plans in the period between April 29, 1980 and the Act's enactment on September 26, 1980, is unconstitutional, in that it violates guarantees against unwarranted deprivations of property. The Act's imposition of liability for actions taken in reliance upon existing law during that "retroactive period" would override contractual limitations on pension contributions and retirement obligations contained in such employers' collective bargaining agreements. It would retroactively establish responsibility for plan "unfunded liability", even though the withdrawing employer: (1) never agreed to such obligations; (2) did not create such plan funding problems; (3) had no control over actions, initiated by plan trustees with fiduciary obligations to participants and beneficiaries, which may have enhanced funding

obligations and shortfalls; and (4) had no notice of any provision of law which could create such liability.

These harsh and unfair effects of the MPPAA's retroactive application are violative of guarantees articulated in the Contract Clause, U.S. Constitution, Art. I, §10, cl. 1, and the Taking Clause, U.S. Constitution, Amendment V. Moreover, the decisions of this Court establish that the retroactive creation of such liability cannot be constitutionally tolerated. In *Railroad Retirement Board* v. *Alton*, 295 U.S. 330 (1935), a pension scheme similar to the MPPAA which imposed upon one employer certain pension liabilities attributable to employees of another employer was invalidated. In *Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234 (1978), another pension scheme which–like the MPPAA–subjected employers to non-contractual liability with no provision for a "grace period" was also found to be unconstitutional. This Court's holdings in *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396 (1920) and in later cases prohibit action to deny an employer's right to withdraw assets from an existing business and to terminate that enterprise. Such right is effectively eliminated by the Act's retroactive imposition of withdrawal liability which can exceed a business' total assets. Finally, this Court's limited approval of retroactive liability in the form of benefits for occupationally-induced lung disease in *Usery* v. *Turner Elkhorn Mining Company*, 428 U.S. 1 (1976), does not immunize the scheme evident in the Act. The withdrawal liability at issue in the instant case was retroactively imposed to meet a former employee's "generalized need for funds" rather than to meet a "specific need created by the dangerous conditions under which the former employee labored." Therefore, the Court of Appeals decision finding that the retroactive application of withdrawal liability is unconstitutional should be affirmed.

3.
ARGUMENT

WITHDRAWAL LIABILITY IMPOSED ON PRE-ENACTMENT TRANSACTIONS DISRUPTS SETTLED CONTRACTUAL EXPECTATIONS AND OTHERWISE VIOLATES THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. MPPAA's Withdrawal Liability Provisions Unlawfully Interfere with the Settled Contractual Expectations of Employers Withdrawing During the "Retroactive Period"

The Constitution of the United States of America prohibits retroactive interference by government with private rights of contract unless such interferences are "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Company of New York* v. *New Jersey*, 431 U.S. 1, 22 (1977). Although this specific prohibition is contained in the Contract Clause, U.S. Constitution, Art. I, §10, cl. 1, applicable to the states, the principles involved are analogous to those which similarly apply to the federal government under the Due Process Clause, U.S. Constitution, Amendment V. *See Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 241 n. 12 (1978).[1]

The Contract Clause prohibits any "Laws impairing the Obligation of Contracts" and was included by the Founders as a "constitutional bulwark in favor of personal security and private rights."[2] They viewed the Contract Clause as the civil

[1] Contrary to the argument advanced in the Brief of Appellant, Pension Benefit Guaranty Corporation ("PBGC"), this Court has recognized that due process jurisprudence has largely encompassed contract clause principles, *see Allied Structural Steel Co.* v. *Spannaus*, *supra*, and that the Fifth Amendment Due Process Clause thus protects against the same unreasonable infringement of contract rights on the part of the federal government. Indeed, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Bolling* v. *Sharpe*, 347 U.S. 497, 500 (1954) (incorporating principles of the equal protection clause of the Fourteenth Amendment into the Due Process Clause of the Fifth Amendment).

[2] *The Federalist*, No. 44 (Madison).

equivalent of the prohibition against *ex post facto* criminal laws, and intended "that *retroactive* interferences [with contracts] only are to be prohibited."[3] They consequently recognized that it is "cruel and unjust" to impose liability on actions taken based on pre-existing law: "[a]ll laws should be therefore made to commence *in futuro*, and be notified before their commencement."[4]

The Act is in direct conflict with these principles and with the rulings of this Court, as its confiscation of the assets of an employer withdrawing during the retroactive period overrides the provisions in freely-negotiated collective bargaining agreements which delineate financial liability for pension obligations and establish a negotiated dollar amount for such contributions. The Act's application of liability to employers who withdrew from multiemployer plans during the retroactive period because of the termination of their obligation to make contributions (for one of several reasons), clearly demonstrates the disruption of expectations protected by the Constitution.[5]

Railroad Retirement Board v. *Alton Railroad Co.*, 295 U.S. 330 (1935), involved this Court's consideration of the Railroad

---

[3] 2 M. Farrand, *Records of the Federal Convention of 1787*, 440, 448-49 (rev. ed. 1966) (statement of Mr. Wilson) (emphasis in original).

[4] *Blackstone's Commentaries*, Introduction, §II at 45 to (Cooley ed. 1884). While the above-quoted statement relates to Blackstone's analysis of "ex post facto" laws, which were viewed as dealing with criminal cases, such views were relied upon by the Founders with respect to the prohibition of such statutes, as well as their civil equivalent found in the Contract Clause.

[5] This Court's holdings have established a "narrower scope" for review "when legislation appears on its face to be within a specific protection of the Constitution." *United States* v. *Carolene Products*, 304 U.S. 144, 152 n. 4 (1938). "[T]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943). Once such a violation of a specific prohibition is shown, the appellants have the affirmative burden to justify the statute without the benefit of any presumption of constitutionality. *Id.*, at 639. *See also, Allied Structural Steel Co.* v. *Spannaus*, 438 U.S. 234, 247 (1978).

Retirement Act, which created a compulsory retirement and pension system funded by mandatory contributions from employers. Those eligible for benefits included persons over 65 years of age, whether or not they were then employed by the contributing railroads. The Court noted:

> Plainly this requirement alters contractual rights; plainly it imposes for the future a burden never contemplated by either party when the earlier relation existed or when it was terminated. The statute would take from the railroads' future earnings amounts to be paid for services fully compensated when rendered in accordance with contract, with no thought on the part of either employer or employee that further sums must be provided by the carrier.

Id. at 349-50. The Court further concluded that the application of the statute had no reasonable relation to the pronounced goals of efficiency and safety. For these reasons, the Court held that the statute violated the Fifth Amendment.[6]

---

[6] The Court's decision in *Alton* was issued in a period when economic regulatory statutes received strict scrutiny under the Due Process Clause. The Court distinguished but declined to overrule *Alton* in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), the case principally relied upon by the Appellants and which is discussed below in further detail. Of significance is the manner in which the remedial compensation scheme considered in *Turner Elkhorn* was distinguished from the pension statute reviewed in *Alton*. The point of the black lung benefits program in *Turner Elkhorn* was to allocate to coal operators an actual, measurable cost of doing business, *not* merely to "increase or supplement a former employee's salary to meet his generalized need for funds". 428 U.S. at 19. In contrast, employers withdrawing during the MPPAA's retroactive period have already met their compensation commitments to employees, including wages, benefits and agreed-upon pension contributions on the individual employee's behalf to a pension fund. In the absence of the "special need" or measurable cost present in *Turner Elkhorn*, the Act is, therefore, specifically designed to "supplement a former employee's salary" by requiring the employer withdrawing during the retroactive period to pay for a level of pension benefits established and promised by the fund, but not by the employer through the collective bargaining agreement or any other mechanism.

Similarly, in *Allied Structural Steel Co.* v. *Spannaus, supra*, this Court struck down a Minnesota statute which had required a company terminating its pension plan or terminating an office within the state to pay a pension funding charge to cover full benefits for those with ten years of service, whether or not their benefit rights had vested. The statute also had imposed minimum funding standards and had held employers responsible for eliminating funding deficiencies. The Court concluded that the statute had substantially impaired the employer's contractual rights by fixing on it obligations radically different from those which had previously existed. The contract rights so impaired were limitations on the employer's pension liability, and the company had reasonably relied on those limitations. The Court specifically noted:

> The company's maximum obligation was to set aside each year an amount based on the plan's requirements for vesting. The plan satisfied the current federal income tax code and was subject to no other legislative requirements. And, of course, the company was free to amend or terminate the pension plan at any time. The company thus had no reason to anticipate that its employees' pension rights could become vested except in accordance with the terms of the plan. It relied heavily, and reasonably, on this legitimate contractual expectation in calculating its annual contributions to the pension fund.

438 U.S. at 245-46. The Court expressly recognized that the employer's reliance on settled contractual expectations was "in an area where the element of reliance was vital–the funding of a pension plan." *Id.* at 246. The Court further stated:

> Thus, the statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts. There is not even any provision for gradual applicability or grace periods.

Id. at 247. Thus, the Court's decision in *Spannaus* suggested that "employers [are] constitutionally entitled to some grace period to adjust their pension planning." *Id.* at 249 n.23. Like the pension law struck down in *Spannaus*, the MPPAA contains no provision for grace periods, but rather makes the liability retroactive for employers who withdrew from plans even before the Act became law. The Act thus violates what the Court's decision in *Spannaus* suggested to be a constitutional entitlement.

The significant contractual expectations of employers withdrawing during the retroactive period which the MPPAA would override far outweigh any "contrary" reliance by covered employees. The employer's contractual limitation of liability to the negotiated contribution level embodied in the collective bargaining agreement is crucial to the employer's bargain with the union. The known and limited commitment allowed employers to plan for the future and to assess the costs involved in signing a collective bargaining agreement with the union, an especially important consideration in view of the employer's lack of control over the plan's operations and decisions.[7] On the other

[7]Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. §186(c)(5) (1976), requires that the trustees of a multiemployer pension plan be equally divided between management and labor. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981). In the operation of a multiemployer plan, the union may lawfully refuse to grant the individual company a representative on the board of trustees or any role in the selection of the management trustees. Thus, in *Central Florida Sheet Metal Contractors Ass'n* v. *NLRB*, 664 F.2d 489 (5th Cir. 1981), the court, relying on *Amax Coal Co., supra*, held that the union acted lawfully by striking to force an employer association to contribute to a trust fund, even though the association had had no voice in selecting a trustee, who had been appointed by the first participating employers' association. 664 F.2d at 495, 499.

In addition, by law, the management trustees may not represent the collective bargaining interests of the employers participating in the plan, but must instead devote themselves exclusively to representing the interests of the employees who are entitled to receive pensions. *See Amax Coal Co., supra*, 453 U.S. at 331-32. Moreover, the pension plan may lawfully grant a benefit even if the individual employer has refused that benefit in collective bargaining, and even though he has refused to increase his contributions to fund the benefits. *NLRB* v. *Teamsters Local 582*, 670 F.2d 855 (9th Cir. 1982), relying upon *Amax Coal Co., supra*.

hand, employees look to the plan for the fulfillment of their pension expectations and to the union for assuring through the collective bargaining process that contributions are sufficient to fund the benefits set by the plan. The employees cannot be said to have relied upon a contractual provision—complete employer underwriting of the plan—that did not exist.

In summary, therefore, the retroactive application of the MPPAA would unconstitutionally disturb the contractual reliance of employers withdrawing before the Act's effective date. The Act impairs the expectations created by collective bargaining agreements which established the obligation of withdrawing employers to initially participate in various pension funds. Employers withdrawing during the "retroactive period" had negotiated and relied upon fixed contribution levels to limit that liability. The MPPAA retroactively shatters such employers' expectations in an irrational and arbitrary fashion by imposing liability which may exceed the total worth of an employer's assets, and which may not be solely related to the employees for whom contributions had previously been made.[8]

---

[8] The MPPAA penalty of withdrawal liability is imposed without regard to whether the liability is attributable to the service of the employer's workers. Under several of the Act's methods of allocating unfunded liability to withdrawing employers (specifically, the "presumptive" formula and the two statutory alternative methods), the calculated share of an employer's liability is based upon the ratio of his contributions to the total contributions of the plan. *See* 29 U.S.C. §1391(b), (c) (1)-(3) (Supp. V 1981). The ratio of employer's contributions, however, bears no relationship to a plan's unfunded liability, as its contribution rate is a product of negotiations with a union. The plan's unfunded liability would be principally derived from ERISA's statutory and nonforfeitability rules, benefit increases established by plan trustees, and unfunded liability arising from withdrawals in the pre-Act period.

B. MPPAA's Withdrawal Liability Provisions Constitute An Unlawful Taking of Property from Employers Withdrawing During the Retroactive Period

The Due Process Clause of the Fifth Amendment prohibits the federal government from taking individuals' private property interests without just compensation for the satisfaction of public needs. Mere governmental regulation may be "so onerous as to constitute a taking which constitutionally requires compensation." *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962). *See also Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922) (". . . a man's misfortunes or necessities will [not] justify his shifting the damages to his neighbor's shoulders"). Federal legislation which results in the confiscation of private property must meet certain conditions in order to survive a constitutional challenge under the Fifth Amendment. In addition, the Taking Clause prohibits efforts by government to force employers to stay in business against their will.[9] Similarly implicated is the related policy of avoiding inhibitions on the free transfer of capital, necessary to preserve the flow of interstate commerce.[10] The MPPAA, as applied to employers withdrawing from multiemployer plans during the retroactive period, fails to satisfy these conditions, which are similar in some ways to those relating to legislation impairing contractual rights.

First, confiscatory legislation must be "reasonably necessary to the effectuation of a substantial public purpose." *Penn Central Transportation Company* v. *City of New York*, 438 U.S. 104, 127 (1978). Moreover, such legislation must not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole". *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).[11] Finally, the

[9] *Brooks-Scanlon Co.* v. *Railroad Commission*, 251 U.S. 396, 399 (1920). *See also Railroad Commission* v. *Eastern Texas Railroad*, 264 U.S. 79, 85 (1924); *Bullock* v. *Florida ex rel. Railroad Commission*, 254 U.S. 513, 521 (1921).

[10] *See e.g., NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 287-88 (1972).

[11] *See also United States* v. *Carolene Products*, 304 U.S. 144, 152, n.4 (1938); *South Carolina State Highway Department* v. *Barnwell Bros., Inc.*, 303 U.S. 177, 184, n. 2 (1938).

means chosen to address a public need must not be "unduly oppressive". *Goldblatt* v. *Town of Hempstead, supra*, at 595. *See also Chatham* v. *Jackson*, 613 F.2d 73, 78 (5th Cir. 1980).

The application of the MPPAA's withdrawal liability provisions to employers withdrawing before the Act's enactment would not necessarily have any direct relation to such employers' assets or to benefits owed to their ex-employees, and would be, therefore, arbitrary and inequitable. Withdrawal liability would be a severe financial penalty imposed to cure funding deficiencies resulting from (1) increases in benefits unilaterally determined by the plan trustees, and (2) benefit funding and vesting rules established by Congress, but not due to any action by the employer. Therefore, it would amount to an oppressive confiscatory taking far beyond the means relatively necessary to achieve the stated purpose of the Act.

The MPPAA in its retroactive application is violative of the important constitutional limitations established in this Court's earlier holdings. As noted above, in *Armstrong* v. *United States, supra*, the Court decided that the federal government could not compel a select few to bear the brunt of a public burden. However, the MPPAA places the retroactive burden of its public purpose on employers participating in multiemployer pension plans as of April 29, 1980, who withdrew on or after that date. Employers who withdrew on or before April 28, 1980 have no such liability. Additionally, the MPPAA exempts from withdrawal liability for a period of six years employers who newly entered multiemployer pension plans after April 28, 1980, or who so enter such plans in the future. Thus, a select group has been chosen to bear the responsibility for resolving what Congress considers to be a public problem. In addition, the MPPAA burdens or abrogates altogether the employer's ability to go out of business or make other significant business decisions. By putting a price tag of confiscation of his assets on any such action, the MPPAA confines the employer to the way he was structured and operating in 1980.

C. The Court of Appeals' Assessment of MPPAA's Retroactive Effects Should Be Affirmed

In its decision, the Court of Appeals concluded that the retroactive application of the Act's withdrawal liability provisions violated constitutionally-guaranteed due process rights of employers who withdrew before the Act became law. The lower court recognized that the MPPAA came to the courts with a presumption of constitutionality, and that a statute with retroactive aspects is not unlawful for that reason alone, unless such effects are harsh and oppressive. *Shelter Framing Corp.* v. *Pension Benefit Guaranty Corp.*, 705 F.2d 1502, 1510 (9th Cir. 1983). In approaching the due process issues raised by the retroactive effects of the Act, the Court of Appeals measured the MPPAA against considerations utilized by the Seventh Circuit in an earlier review of ERISA's application to single-employer plans in *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 592 F.2d 947 (7th Cir. 1979), *aff'd*, 446 U.S. 359, *reh'g denied*, 448 U.S. 908 (1980). In examining whether the statute's retrospective imposition of liability superseded a liability exclusion clause in the plan, the court in *Nachman* analyzed four factors: 1) reliance interests; 2) previous regulatory control of the private interest arguably impaired; 3) equitable interests, and 4) applicable moderating provisions.

Adopting a similar analysis in reviewing the retroactive imposition of the MPPAA's withdrawal liability provisions, the Ninth Circuit properly concluded that reliance interests clearly weighed in favor of the employers:

> It was not certain at the time they withdrew that the Amendments Act would be enacted and would have a retroactive effect. We reject the argument that the employers should have known of the status of the pending legislation and should have known that the Act, when passed, would have a retroactive effect. This much-debated legislation went through a variety of forms before its passage. The bill's original effective date was changed as late as June 1980 . . . it would have been impossible for anyone

> to predict with accuracy the final outcome of the legislative process.

705 F.2d at 1511 (citation omitted). In evaluating the reliance interest of participants and beneficiaries, the appellate court correctly found that such interests rest upon the solvency of the multiemployer plan as a whole, rather than upon any single employer's contribution. Such an expectation "does not necessarily translate into a justified reliance interest in any single employer's withdrawal liability." *Id.*

Moreover, the Court of Appeals determined that the mere existence of prior regulation of pension plans—at least since the passage of ERISA in 1974—did not weigh in favor of the Act's retroactive application. It correctly recognized that the MPPAA was not a minor clarification or modest modification of preexisting regulation, but rather that it imposed a much more harsh and heavy burden than had been imposed upon withdrawing employers under ERISA. Thus, prior to the Act's enactment, contributing employers could generally withdraw from an ongoing plan without being subject to any immediate liability. Such employers could be subject to liability—and then only to a maximum of thirty percent of their net worth—if the plan terminated within five years of their withdrawal. 29 U.S.C. §1363 (1976) (amended 1980).[12] The Ninth Circuit properly went on to hold that the absence of such effective moderating provisions from the Act distinguished it from the single-employer scheme upheld in *Nachman, supra.*

Finally, the Court of Appeals reviewed the burdens imposed by the MPPAA upon individual employers assessed with liability, in conjunction with the policies Congress hoped to further by establishing a retroactive date for the Act. It correctly noted the narrow scope of permissible retroactive legislation, and accurately concluded that the extremely harsh burdens

---

[12] "Substantial employers", *i.e.*, those employers responsible for ten percent of a plan's total contributions, could similarly withdraw without facing immediate assessments of liability prior to the enactment of the MPPAA. Such employers were required to post a bond against their potential substantial liability. 29 U.S.C. §1363 (1976) (amended 1980).

imposed by the MPPAA were not justified in the absence of "special needs" or "hidden risks" which served to justify other forms of retroactive legislation. *Shelter Framing Corp.* v. *Pension Ben. Guar. Corp., supra*, 705 F.2d at 1513-14.

In reaching its contrary conclusion on the same question, the Fourth Circuit, in *Republic Industries, Inc.* v. *Teamsters Joint Council No. 83*, 718 F.2d 628 (4th Cir. 1983), concluded that the Act was rational, basing its conclusions principally upon the reliance interests of employees in receiving vested benefits. By contrast, that court minimized the reliance interest of employers irrevocably withdrawing from multiemployer plans at a time when such action generated no immediate liability, and stated that Congressional debate and actions prior to enactment gave all employers fair notice of "the substantial impact of withdrawal liability". 718 F.2d at 639. It found that because single-employer plan termination had been regulated since the enactment of ERISA, the postponement of multiemployer withdrawal liability merely evidenced Congressional caution, raising no reliance interest on the part of employers contributing to such plans. While recognizing that employee pension expectations may have been based on "promises" which may have been "implied" rather than actual, *Id.*, the Fourth Circuit failed to consider unique distinctions in the operation of the multiemployer plans at issue, *i.e.*, that employers merely agree to make specified contributions, and that benefits are established or "promised" by trustees who exclusively represent the interests of participants and beneficiaries, *supra* note 7.

In *Peick* v. *Pension Benefit Guaranty Corporation*, _____ F.2d _____, No. 82-2081 (7th Cir., Dec. 19, 1983), the Seventh Circuit recently affirmed the "extremely close call"[13] of U.S. District Court Judge Susan Getzandanner that the retroactive aspects of the Act's application of withdrawal liability to pre-enactment actions was constitutional. That court concluded that a balance of equitable interests did not weigh against the

---

[13] *Peick* v. *Pension Benefit Guaranty Corporation*, 539 F. Supp. 1025, 1056 (N.D.Ill. 1982), *aff'd* _____ F.2d _____, No. 82-2081 (7th Cir., Dec. 19, 1983).

constitutionality of the Act's retroactive provisions. *Peick*, slip op. at 49. The Seventh Circuit's approval of withdrawal liability assessments for pre-enactment actions was premised upon its view that employers could not properly rely on existing law when engaging in pre-enactment transactions later producing liability assessments:

> During the period between April 29 and September 26, 1980, it was clear to anyone concerned about multiemployer pension plans that employers would be subjected to withdrawal liability under the MPPAA. At most an employer could claim only uncertainty as to the details of this liability, not that this liability was a surprise.

Peick, slip op. at 45.

Consistent with such views, the appellants herein argue that Congress properly held employers responsible for knowledge that the MPPAA would be passed, and that it would have a pre-enactment effective date. One court has suggested that it was "hardly credible" for employers to deny knowledge of the proposed Act's retroactivity, *Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 549 F. Supp. 404, 409 n. 8 (S.D.N.Y. 1982), *argued* No. 83-7004 (2d Cir., Oct. 3, 1983), and Appellant herein, PBGC, cites three general news reports (two of which were "buried" on the inside pages of The New York Times and The Wall Street Journal) in support of the proposition that the pending Act's provisions were widely known. Brief for Appellant, PBGC, at p. 35-6. NAWGA respectfully submits that such "notice" cannot be fairly ascribed to the many small and medium-sized businesses across the country (who—needless to say—cannot and do not finance squadrons of Washington representatives to monitor pending legislation), who contributed to multiemployer plans on behalf of a relatively small number (and/or portion) of their employees. Such employers' assets may be more than entirely consumed by the statutory withdrawal penalty which did not exist at the time those employers took irreversible business actions. *See* Appellee's Motion to Affirm, p. 20, n. 6, and authorities cited therein. Appellant PBGC suggests that this harsh retroactive application

of withdrawal liability is justified in all instances by the fact that retroactive provisions had been part of the bill throughout Congressional deliberation, and by the fact that the scope of the retroactive period had been shortened.[14]

NAWGA submits that the appellants' theory would establish a standard holding large and small employers to knowledge of detailed and complicated provisions of every legislative proposal which, if eventually enacted, might effect business actions taken before enactment. That such a standard would be unduly burdensome, unfair and unworkable is illustrated in the case of the MPPAA, in that the penalty which the statute would impose in the case of retroactively-applied withdrawal liability can include the termination of an employer's business and the seizure of all of a covered business' assets.

The petitioning parties have urged reversal of the decision below, arguing that the Act's retroactive application of withdrawal liability to employers who justifiably relied on existing law in entering business and in consummating economic transactions prior to MPPAA's enactment is constitutional. The petitioning parties contend that the Act and its effects are both rational and necessary. Both appellants rely principally upon this Court's holding in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), in support of their view that the Act's retroactive imposition of withdrawal liability passes constitutional muster. *Turner Elkhorn* involved the review of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, 30 U.S.C. §901, *et seq.*

[14] While much is made in the briefs of the petitioning parties of the fact that hat the five-month retroactive period was necessary to deter "hasty" withdrawals by employers anticipating MPPAA's enactment, it is worthy of note that such a "flood" of withdrawals would have likely required wholesale contractual and statutory violations. While those employers whose contracts expired in the retroactive period might have been able to effectuate withdrawal (as might employers going out of business or those able to negotiate contractual arrangements allowing withdrawal during a contract term), the vast majority of multiemployer plan contributors were bound by effective contracts during this "retroactive" period. Unilateral action to cease multiemployer plan contributions would likely have breached such employers' contractual promises to make specified contributions to a specified retirement plan, and violated Section

(1970 ed. and Supp. IV)[15] which provides benefits to coal miners, former miners, their dependents and survivors for death or disability due to pneumoconiosis arising out of coal mine employment.

In *Turner Elkhorn*, coal mine operators who were liable for the payment of benefits to eligible miners under Part C of the black lung benefits program contended that the statute violated constitutional guarantees of due process, in that they were required to compensate certain of their former employees whose coal mining terminated before the statute's enactment. The operators argued that such obligations impermissibly imposed unexpected liabilities for past completed acts. Upholding the validity of the Black Lung Benefits Act, this Court stated that ". . . legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations", even if such statutes impose new duties or create liability based on past acts. 428 U.S. at 16.

At the same time, the Court noted that distinctions exist between due process standards applicable to prospective legislation, and those applicable to retroactive measures:

> It does not follow . . . that what Congress can legislate prospectively it can legislate retroactively. The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

Id., at 16-17. The Court's opinion placed into further question any scheme imposing retroactive liability based upon theories of "deterrence" or of "blameworthiness". *Id.*, at 17-18.

8(a) (1) and (5) of the National Labor Relations Act, 29 U.S.C. RR158(a) (1), (5), by unilaterally changing a term and condition of employment.

[15] The black lung benefits provisions of the U.S. Code were subsequently amended by the Black Lung Benefits Reform Act of 1977, P.L. 95-239 (1978); the Black Lung Benefits Revenue Act of 1977, P.L. 95-227 (1978); and the Black Lung Benefits Amendments of 1981, P.L. 97-119 (1981).

Concluding that the Black Lung Benefits Act rationally resolved issues of cost spreading within the coal mining industry, the Court relied upon that statute's scope and purpose, which it distinguished from the pension scheme invalidated in *Railroad Retirement Board* v. *Alton R. Co., supra*:

> The point of the black lung benefit provisions is not simply to increase or supplement a former employee's salary or meet his generalized need for funds. Rather, the purpose of the Act is to satisfy a specific need created by the dangerous conditions under which the former employee labored–to allocate to the mine operator an actual, measurable cost of his business.

428 U.S. at 19. In contrast, the retroactive liability at issue in the instant case bears no resemblance to the occupational disease payments approved in *Turner Elkhorn*, which were imposed upon employers whose profits were likely related to the diminished health giving rise to liability. Rather, it *is* designed solely to supplement a former employee's wage and benefit compensation beyond the level specifically set forth in the governing collective bargaining agreement, so as to meet the unfunded liabilities of the pension plan.

Retroactive imposition of withdrawal liability under the MPPAA is distinguishable further from the liability imposed in *Turner Elkhorn*. First, the imposition of liability in *Turner Elkhorn* was for the sole and direct benefit of the employer's own employees, from whose labor the employer had profited. Withdrawal liability under the MPPAA lacks a direct employer-employee link. While it is true that a withdrawing employer is assessed a share of the plan's unfunded vested liability, such liability does not necessarily accrue to the employees on whose behalf an employer had agreed to contribute to the plan in the first place.

Second, the allocation of costs to provide relief for those with black lung disease represented a Congressional attempt to address a specific problem which had arisen directly from employees' working conditions, *i.e.*, lung disease arising from coal

mine employment. Indeed, this Court noted in *Turner Elkhorn* that pneumoconiosis was not recognized in the United States as a distinct disease process until the 1950's; the massive number of benefit claims filed in the first years of the black lung benefits program demonstrated the scope of the problem faced by Congress, *i.e.*, providing disease compensation where state laws were inadequate, and where the illness had been insufficiently appreciated. *Turner Elkhorn, supra*, 428 U.S. at 8, n. 7, and 17, n. 17. The unique need which was present in *Turner Elkhorn* is absent in this case.

While pension expectations of workers represent a worthy societal and Congressional concern, the imposition of harsh and unlimited penalties capable of consuming an employer's total assets through a statute which operates retroactively upon closed and irrevocable actions is arbitrary, irrational and unfair. The Act's withdrawal liability provisions, as applied to pre-enactment transactions, violate fundamental notions of fairness and due process, are manifestly disruptive of property rights and contractual expectations, and should be held to be unconstitutional by this Court.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

/s/_____
William H. Borghesani, Jr.

WILLIAM H. BORGHESANI, JR.*
(*Counsel of Record)
MICHAEL F. MORRONE
PETER A. SUSSER
KELLER & HECKMAN
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-1100

Attorneys for *Amicus Curiae*,
National-American Wholesale
Grocers' Association

January 10, 1984